NO. 86-1178

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

CLAY W. DIPPEL,

Appellant,

vs.

TACO BELL CORP.,

Appellee.

On Appeal From The Supreme Court of Missouri

APPELLANT'S REPLY BRIEF

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February 19, 1987

LISTING OF PARTIES

The parties named in the caption are the only parties to this action. Since 28 U.S.C. Section 2403(b) may be applicable, service shall be made on the attorney general of the State of Missouri.

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BRIEF OPPOSING MOTION TO DISMISS

Pursuant to Supreme Court Rule 16.5, Appellant Clay W. Dippel files this brief in opposition to Appellee's Motion to Dismiss as jurisdiction was present under 28 U.S.C., Section 1257(2) on three theories. First, Appellant raised the 14th Amendment due process violation in the Missouri Supreme Court. Second, the decision to retroactively apply Missouri Revised Statute Section 290.140

(Vernon 1982)[1] necessarily involved the decision whether such application was constitutional. Finally, the Missouri Supreme Court already decided the specific issue of the constitutionality of retroactively applying Section 290.140, and that particular decision was relied upon and was the controlling decision in this case.

ARGUMENT

1. Jurisdiction by appeal under 28 U.S.C. Section 1257(2) does lie because Appellant alleged a 14th Amendment due process violation at the only times in the Missouri Courts when the federal right was at issue.

It is well established that a claim of a federal right must be asserted in state court at the proper time for jurisdiction on appeal under 28 U.S.C. Section 1257(2). Morrison v. Watson, 154 U.S. 111, 115 (1894). Furthermore, that claim of a federal right doesn't have to be in the trial court. Whitfield v. Ohio, 297 U.S. 431 436 (1936). In this case, the issue of a violation of the

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[1] Hereinafter, the statute will be referred to as Section 290.140.

14th Amendment due process clause did not arise until the Missouri Court of Appeals, Eastern District, reversed the trial court based on the decision in Vaughan v. Taft Broadcasting, 708 S.W.2d 656 (Mo.banc 1986).

Once the federal right was at issue, Appellant asserted it in every subsequent pleading in Missouri Courts. Specifically, Appellant's Application for Rehearing or in the Alternative Transfer to the Supreme Court, paragraph 3; Appellant's Application For Transfer to the Supreme Court, paragraph 4, read:

> "The change of law after argument of the instant case in the Court of Appeals constitutes a violation of the Due Process clauses of both the Constitution of the State of Missouri, Article I, Section 10, and the 5th and 14th Amendments to the Constitution of the United States of America . . ."

The Appellee, in its Motion to Dismiss, Argument 1, page 3, states that the "change of law" referred to by Appellant was probably the decision in Vaughan, supra.[2] Vaughan is the

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[2] In Vaughan, the Supreme Court of Missouri reversed all prior precedent (footnote continued)

only "change of law" which was applied on appeal and this change of law was the controlling factor in the court of appeals decision. There is no room for speculation. It is the application of Vaughan to the present case which gives rise to the 14th Amendment due process violation. The application of a statute was drawn in question as repugnant to the U.S. Constitution, and the state court held that the application of the statute was constitutional. Therefore, the Supreme Court of the United States has jurisdiction on appeal under 28 U.S.C. Section 1257(2). Charleston Federal Savings & Loan Association v. Alderson, 324 U.S. 182 (1945).

2. Jurisdiction by appeal under 28 U.S.C. Section 1257(2) does lie because the decision to retroactively apply Section 290.140 necessarily involves the decision whether such application is constitutional.

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concerning the retroactive application of Section 290.140 including 2 cases in which the Missouri Supreme Court refused Application to Transfer under which Appellant's judgment would have been secure.

The Supreme Court has jurisdiction over the judgment of a State Supreme Court when the judgment necessarily involves the decision whether a state statute conflicts with the Constitution of the United States, whether it is noticed in the opinion or raised for the first time on appeal. Arrowsmith v. Harmoning, 118 U.S. 194, 195 (1885). The dissent in O'Neil v. Vermont, 144 U.S. 323, 348 (1891), states, "The true test is not whether the record exhibits an express statement that a federal question was presented, but whether such a question was decided,a nd decided adversely to the Federal right."

In the present case, Appellant had a "vested right" in a punitive damage award after judgment. Pending appeal, the Missouri Supreme Court in Vaughan held that Section 290.140 could be retroactively applied to take away a punitive damage award after judgment. That decision was then applied to the present case to take away Appellant's "vested right".

This decision necessarily involved a determination whether the retroactive application of Section 290.140 was unconstitutional. The question was decided and it was decided adversely to the federal right. Therefore, the Supreme Court of the United States has jurisdiction under 28 U.S.C. Section 1257(2).

3. Jurisdiction by appeal under 28 U.S.C. Section 1257(2) does lie because the Missouri Supreme Court has decided the issue of the constitutionality of the retroactive application of Section 290.140 and that particular decision was relied upon in this case.

The Supreme Court has continually denied jurisdiction on appeal when the federal question has not been presented to, relied upon, or decided by the highest court of the State. Charleston, supra. Simmerman v. Nebraska, 118 U.S. 54, 54 (1885), Hiawassee Power Co. v. Carolina-Tenn Co., 252 U.S. 341, 343 (1919), Onondaga Nation v. Thacher, 189 U.S. 306, 310 (1903). There is jurisdiction, however, from the highest court of a state in which a federal question was treated, properly

raised, passed upon, and contrary to the claim of constitutionality. Home Ins. Co. v. Dick, 281 U.S. 397, 407 (1930). Furthermore, there is jurisdiction if the question was presented or passed upon and necessary to the judgment. Wilson v. Cook, 327 U.S. 474, 480 (1960).

In reference to this case, the issue of the retroactive application of Section 290.140, in possible violation of the 14th Amendment due process clause, was specifically addressed in Vaughan, supra 660:

> "This Court concludes that the trial court erred in submitting a punitive damages instruction to the jury; plaintiff cannot recover punitive damages because he had no vested right to such damage at the time the 1982 statute became effective."[3]

This holding in Vaughan was then relied upon and basically was the deciding factor in the present case to take away Appellant's "vested right" in a punitive damage award after judgment.

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[3] Prior to Vaughan, case law held punitive damages were recoverable, where the cause of action accrued and suit was filed prior to the effective date of the amendment as Appellant's case was.

Therefore, the Missouri Supreme Court has been presented with the specific issues present in this case; it has held that the reversal of all prior precedents to retroactively apply Section 290.140 is constitutional. That holding, was then relied upon and was the necessary controlling factor in the outcome of the present case. As a result, the Supreme Court of the United States clearly has jurisdiction under 28 U.S.C. Section 1257(2).

CONCLUSION

For the foregoing reasons, Appellant Clay W. Dippel respectfully urges this Court to deny Appellee's Motion to Dismiss for lack of jurisdiction, and also to deny Appellee's Motion to Dismiss for want of a substantial federal question for reasons stated in Appellant's jurisdictional statement.

Respectfully submitted,

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